House Judiciary Committee

April 18, 2007

Testimony of Citizens Alliance on Prisons and Public Spending

Good morning, Chairman Condino and members of the Committee. My name is Ron Bretz. I am a professor at the Thomas Cooley Law School and the president of CAPPS, the Citizens Alliance on Prisons and Public Spending. With me is Barbara Levine, the executive director of CAPPS.

I appreciate the opportunity to talk to you this morning because CAPPS, as an organization and I, based on my own experience, think the amendments proposed by HB 4548 are badly needed. In my 30 years as a member of the Michigan Bar, the last 10 at Cooley and 20 before that handling criminal appeals, I have had a great deal of contact with Michigan prisoners and the Michigan prison system. I firmly believe that much of the growth in the prisoner population could have been avoided if the parole guidelines had been implemented as the Legislature intended.

Attached to my written testimony is a chart that lays out the rationale for each section of the bill. We will be happy to answer any questions about the details. To begin, however, I will focus broadly on what the problems are, what this legislation does to address those problems, and, perhaps as importantly, what the legislation does not do.

The legislature mandated the adoption of parole guidelines in 1992, when the membership of the parole board was changed from civil servants to appointees. The guidelines were supposed to place some external constraints on the board's discretion, just as the sentencing guidelines place constraints on judicial discretion.

Parole guidelines are scored when people have served enough time to be eligible for release. They award either positive or negative points for a variety of factors. Depending on the resulting score, the person is categorized as high, average or low probability of release. Of the people who score high probability, no more than five percent will commit a new assaultive offense within two years, if released. Stated differently, 95 percent of the people who get high guidelines scores present no risk for a new assaultive offense. Of course, we are talking about statistical risk. You never know for sure how any particular individual is going to act in the future. But, because of their low risk, the statute presumes that people with high scores will be released, unless there is reason to depart from that presumption in an individual case.

When judges give a higher or lower sentence than sentencing guidelines presume is appropriate, they have to state substantial and compelling reasons. When the parole board continues someone's incarceration even though the parole guidelines presume release is appropriate, the board is also required to state substantial and compelling reasons. The critical difference is that the sentencing guidelines are enforced because defendants can appeal departures to a higher court. Judges must have objective and verifiable reasons for departing that have not already been

taken into account by the sentencing guidelines. Thus the vast majority of sentences are within the sentencing guidelines range.

On the parole side, things look quite different. Since 1999, prisoners have had no right to appeal board decisions, so the parole guidelines are not enforced. MDOC data shows that the proportion of people with high guidelines scores who are granted parole has steadily declined. It dropped from 81 percent in 1996 to only 53 percent in 2006. Last year's grant rate for people with average parole guidelines scores was 48 percent. Relatively few people score low probability of release. For everyone else, the chance of being paroled is roughly 50-50, regardless of their parole guidelines score. The board's discretion to ignore its own risk assessment instrument and make purely subjective decisions is absolute. Surely this was not what the legislature intended.

In case after case, the board appears to be denying release to people with high probability scores solely on the basis of the person's offense. No matter how hard prisoners have worked to earn release, how good their treatment reports are, how few misconduct citations they have earned, the board says it lacks adequate assurance the person is not still a risk. This even happens in cases where people are going out into the community every day on work programs and have glowing reports from their civilian employers. It also happens in cases where judges departed below the sentencing guidelines because they felt circumstances made a lesser sentence appropriate.

The "substantial and compelling reasons" given for not paroling these low risk offenders are often difficult to understand. Sometimes they ignore or directly contradict information in the prisoner's record. Sometimes they are conclusions drawn from interviews, such as, "despite good therapy evaluation, at interview prisoner lacked insight." Since the interviews are not recorded, there is no way of knowing what the prisoner said that justifies the conclusion. Sometimes it is merely the assertion that the board doesn't feel assured, without any facts stated in support.

It is not uncommon for someone with a high probability score to be continued for one or two or three years, and then paroled. The only things that have changed are that the person has served more time and that a different parole board member has conducted the interview. There is no evidence that the risk to public safety has changed.

For the more than 800 parolable lifers who, by law, became eligible for parole after serving 10 years, the board does not even calculate parole guidelines scores. It is aware that the majority of the lifers, many of whom have now served 25 and 30 years, would score high probability of release, but it does not see that risk assessment as relevant to the release decision.

This sort of parole decision-making has numerous consequences. First and foremost, it changes the minimum sentence to being simply a trigger for the parole board to decide how long *it* thinks someone should serve. The norms set by the legislature in sentencing guidelines, the intentions of sentencing judges, the agreements reached by prosecutors and defense attorneys in plea

negotiations – these are all rendered irrelevant. The criminal justice system is turned on its head by allowing the parole board effectively to engage in resentencing.

Decisions that are inexplicable and unreviewable are unfair to prisoners and their families. They send the message that it doesn't matter how much people learn from their mistakes or work to improve their prospects for the future, they don't deserve a second chance. They cause great frustration to people who feel they are being treated arbitrarily. The fact that prosecutors and victims can appeal decisions to grant parole but prisoners cannot appeal denials compounds the unfairness to individuals and skews the process. At some level the board has got to be conscious of the fact that an unpopular decision to release can be appealed to the courts while a decision to deny release cannot.

Inexplicable decisions are also unfair to the public. The parole board is an administrative agency whose work directly affects tens of thousands of people and hundreds of millions of taxpayer dollars. For it to be properly accountable, its decision-making processes should be transparent and subject to review.

You will hear that many of the people with high probability scores who are denied parole committed assaultive offenses or were returned to prison as technical parole violators. That is all true. But it does not mean that the guidelines should be ignored. For one thing, "assaultive offense" covers such a wide range of behaviors that the label conveys very little. One has to look at each individual's behavior in context. In addition, the nature of the offense was taken into account by the sentencing guidelines and the sentencing judge. The minimum sentence reflects society's view of how much punishment is appropriate. And many technical parole violations have nothing to do with re-offending. Unless the board has an objective basis for believing that an individual is currently at risk for re-offending despite a high parole guidelines score, the board's feelings about the crime or about non-compliance with supervision rules that are unrelated to crime should not be a reason to deny parole. The guidelines were *designed to avoid* that sort of subjective decision-making.

HB 4548 would address many of these problems. It would clarify that the intent of the sentencing judge in setting the minimum sentence is relevant to the parole decision unless superceded by evidence of current danger to the community. It would require the parole guidelines to be weighted so that the predictive power of key factors, including the offense, is separately validated. It would follow the pattern of the sentencing guidelines and allow for appeals of board decisions that depart from the parole guidelines. It would require that parole interviews of people with high probability scores be recorded so that a record for appeal exists. It would prohibit departures from the guidelines based on factors that were already adequately scored. It would require that guidelines scores be calculated for all parole-eligible prisoners, including lifers. And it would require the board to reconsider at least every 12 months people who were not paroled despite high probability scores. Over time, a body of law defining substantial and compelling reasons for departing from the parole guidelines would develop, parole grant rates would increase, and the prisoner population would decline.

That is what the bill would do. This is what it will not do. It will not permit the release of any person who has not served the minimum years required by his or her sentence. It will not require that any particular person be released. It will not prevent the board from departing from the guidelines or even from continuing someone all the way to the maximum sentence, so long as there are substantial and compelling reasons that bear independent scrutiny.

It will not cost inordinate amounts of money to record and store parole interviews. The recording requirement only applies to high probability cases and many people with high probability scores are paroled without interviews. Many interviews are now conducted by teleconference, so the technology to record them certainly should be available. The MDOC has been recording and storing all prisoner telephone calls for nearly 15 years.

It will not cost inordinate amounts of money to respond to prisoner appeals. There is no right to appointed counsel for these appeals. And the grounds for appeal are quite limited. Claims of scoring errors and reliance on inaccurate information must be pursued administratively first. The department can prevent those appeals simply by correcting errors and omissions. Only people with high guidelines scores can appeal the substance of decisions to deny parole. Many of them will not pursue an appeal if they know they will be considered again in a year. So appeals will be limited to low risk people who feel most aggrieved by long or repeated parole denials, which is how it should be. And given the cost of an appeal compared to the annual cost of keeping someone in prison, it will take very few successful appeals to offset the cost of them all.

You are hearing a lot about the importance of drawing sentencing guidelines so that judges don't use scarce prison beds unnecessarily. Well, for those people who do go to prison, it is the parole board, in large part, that determines how long they will stay. Guidelines are just as important at the back end of the sentencing process as at the front end. They are just as important for appointed administrative board members as they are for elected judges. Improving and enforcing parole guidelines is a critical part of the overall effort to ensure that our prison system is no bigger, and no more expensive, than it has to be to protect public safety.

The statute requiring parole guidelines was enacted 15 years ago. It is time to reassess whether that statute is working as intended. HB 4548 does not present any radical new ideas. On the contrary, it is a moderate attempt to implement a fair, rational and cohesive statutory scheme.

I urge you to support HB 4548.

Thank you for your attention.

HB 4548: Parole Guidelines

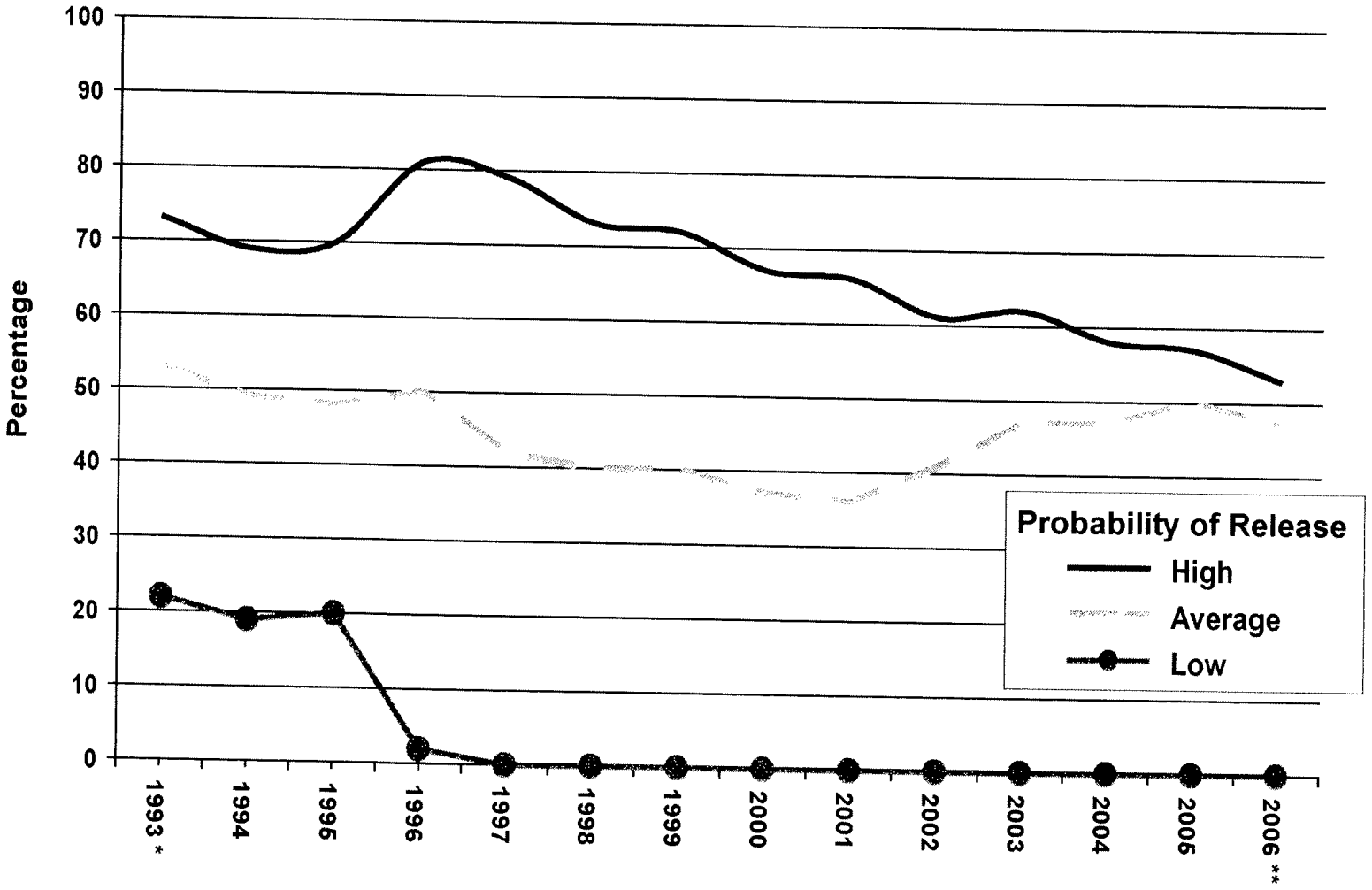
Section	What It Does	Why It's Needed	Comments
33e (1)	Emphasizes that sentencing is the province of the trial judge and that the parole board's role is to determine whether incarceration beyond the minimum is necessary to protect the public.	People with high guidelines scores are frequently denied release because of the parole board's reaction to the offense, although the offense was already considered by the sentencing guidelines, the sentencing judge and, typically, during plea negotiations. This tends to negate the meaning of the minimum sentence.	This statement of purpose does not conflict with the board's duty under Sec. 33 (1) not to release someone without "reasonable assurance" that s/he will not be a threat to public safety.
33e (2) (A) – (C)	Requires the guidelines to serve three purposes: 1) protect the public, 2) accurately assess current risk, 3) acknowledge a positive institutional record	Statute does not currently mandate that the guidelines accurately assess current risk for reoffending or reward positive conduct.	Research shows that statistical risk assessment tools are more accurate than the "gut" predictions of individual decision-makers.
33e (2) (D)	Requires the calculation of a guidelines score for every prisoner eligible for parole.	Currently the guidelines are not scored for parolable lifers when the board decides whether to proceed to public hearing. It routinely continues people for five years without assessing whether they pose any risk.	More than 850 lifers who were sentenced in the 1960-'80s became eligible for release after serving ten years. The majority would score high probability of release on the parole guidelines and are denied because they are lifers, not because they pose a risk.

Section	What It Does	Why It's Needed	Comments
33e (3) & (4)	Requires that the relationship of offense, age, institutional conduct and prior record to the risk of reoffending each be separately validated and that the points assigned for each factor accurately reflect its ability to predict risk.	Currently the guidelines instrument as a whole has been proven to predict the risk of a new assaultive offense, but individual factors have not been separately validated. People may be getting negative points for factors that are not actually associated with high re-offense rate, particularly offense factors.	While certain factors do tend to correlate with a higher re-offense rate, the correlations are not always what people expect. For example, three negative points are given for a death although homicide offenders have very low recidivism rates. If the guidelines are to be used to predict risk, the factors that actually serve that function should be clearly identified and verified.
33 (5)	Requires the guidelines to also consider the prisoner's program performance, physical and mental health, and previous experience with probation or parole.	Although these factors may not statistically predict future risk, in individual cases they may be highly relevant to whether parole is appropriate and should be considered.	Some factors that can't be statistically tested for all prisoners, like serious medical problems or specific behavior while on probation, may nonetheless be predictive for individuals.
33 (6)	Permits the guidelines to positively weigh family and community support, the probability of deportation and detainers from other U.S. jurisdictions; prohibits weighing the sheer fact that the person is serving a long indeterminate or parolable life sentence.	The guidelines currently do not give any credit for having a strong support system nor do they account for the fact the person would be deported to another country or incarcerated in another state if released. Before the board stopped calculating guidelines scores for lifers altogether, it gave four negative points to people being considered under the lifer law.	Guidelines should be designed to account for all factors that would reduce risk. Factors that have no logical connection to risk or any other sound basis in policy should not be counted.

Section	What It Does	Why It's Needed	Comments
33 (8)	Prevents the board from basing a departure from the guidelines on a factor already scored in the sentencing or parole guidelines without a finding the factor was given too little or too much weight.	Currently, a "substantial and compelling reason" for departing from a high parole guideline score may be a factor already counted in the sentencing guidelines used to set the minimum and/or in the parole guidelines themselves.	This language is taken from the prohibition on double-counting that appears in the sentencing guidelines statute.
33 (9)	Permits prisoners to appeal parole denials on one of three grounds: -lack of substantial & compelling reason to depart from high guidelines score -material mistake in guidelines scoring that board failed to reconsider after notice from prisoner -reliance on inaccurate or incomplete information that board failed to reconsider after notice from prisoner	Prisoner appeals of parole board decisions were eliminated in 1999, leaving no way to enforce compliance with the guidelines. The parole grant rate for people with high guidelines scores peaked at 81% in 1996. In 2006, it was 53%. Despite a statutory presumption that people with high scores will be released unless "substantial and compelling reasons" exist, there is little difference in the release rates of those with high and average scores. Both have roughly a 50-50 chance. (See attached graph.)	This language is taken from the appeal provisions in the sentencing guidelines statutes and would minimize appeals because: 1. Only people denied parole despite high guidelines scores could contest the board's reasoning; 2. Claims of scoring errors or inaccurate information would first have to be raised administratively; 3. People who know they will be reconsidered in 12 months often won't bother to appeal (see Sec. 35(12).
33 (10)	Requires that parole denial notices explain the scope of the right to appeal, applicable deadlines, and that there is no right to appointed counsel.	The right to appeal is meaningless if people don't know they have it. Since prisoners have no right to counsel at public expense they should at least be made aware of the deadline by which they must act on their own.	This mirrors the process for advising defendants of the right to appeal sentencing guidelines issues.

Section	What It Does	Why It's Needed	Comments
34 (8)(c)	Recognizes that a decision not to proceed to public hearing on a parolable lifer is effectively a decision to deny parole.	Parolable lifers can only be released after a public hearing. If the board decides it has "no interest" in conducting a public hearing, the person is not considered for another 5 years. But the statute currently says that only a decision made after a public hearing is technically a decision to deny parole, so "no interest" decisions could not be appealed.	This treats lifers who have become eligible for parole under the "lifer law" like everyone else who has served enough time to become eligible.
35 (1)	Requires that parole interviews of people who score high on the guidelines be recorded so they can be transcribed if there is an appeal.	It is common for the board to give as a "substantial and compelling reason" for departing from the parole guidelines a conclusion reached at the interview, such as, "prisoner didn't show adequate insight." Because the interview is not recorded, there is no way to review the basis of such conclusions.	Presumably the technology exists to store recordings of parole interviews, most of which are now conducted by video-conferencing. The MDOC has recorded and stored every telephone call made by every prisoner for the last 14 years.
35 (12)	Requires the board to reconsider people with high guidelines scores, other than parolable lifers, at least annually.	Currently, the board can continue someone for 12, 18 or 24 months. There are no criteria governing the exercise of this discretion.	If a high parole guidelines score does not result in release as the statute contemplates, it should at least warrant annual review.

Total Board Votes to Grant Parole, by Parole Guidelines Score ‡



‡ The number of board votes does not equal the number of parole decisions. Except for parolable lifers, parole decisions are made by the votes of two board members, unless a third is needed to break a tie. Parole guidelines scores are not calculated for parolable lifers.

* Includes Nov. - Dec. 1992

** Covers Jan. - Oct. 2006

Faces behind the Figures

Are we safer because they're behind bars?

Aldo Gallina, *No. 205962*

Crimes: Murder, 2nd degree & felony firearm

Sentences: 15-30 yrs +2 yrs

First Possible Release: Oct. 15, 2005

Aldo Gallina, left, at 15 when he committed the crime. Today, he is 33.

Aldo Gallina, who has no prior offenses and spent two years attending community college while on bond pending appeal, has a fine institutional record, an excellent therapy report and unshakable family support. While his co-defendant, with a similar history, was released in 2005, Gallina has been denied parole for a second time.

On July 2, 1989, when Aldo Gallina was 15, he was out riding in Dearborn with other teenagers. They became involved in a confrontation with boys in another car that ended with the shooting death of 15-year-old Charles Schramek. While Gallina and his 16-year-old co-defendant, Eric Rode, both admitted firing the gun that Gallina pulled from the glove compartment, each denied having fired the fatal shot. The prosecution charged Gallina as an aider and abettor on the theory that Rode was the shooter. Gallina and Rode were tried together as adults and convicted of second-degree murder. Both were sentenced to serve 15-30 years in prison, plus an additional two for felony firearm.

Gallina, the second of six children, was raised in a stable, supportive family environment. He was an average student who played junior varsity football and had no juvenile record or discipline problems. The presentence investigator described him as "somewhat mild-mannered" and "soft-spoken."

During the lengthy appeal process, Gallina and Rode both spent two years on bond in the community. Gallina lived with his family, worked full-time, and earned 33 credits with a major in Fire Science Technology at Henry Ford Community College. He was under no court supervision and had no police contact.

Gallina has also done well in prison, earning good work reports and few misconduct citations;

CAPPS

CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING

115 W. Allegan St., Suite 401, Lansing, MI 48933
517-482-7753 www.capps-mi.org capps@capps-mi.org

his last "ticket" was in 1997 for being out of place. He served on work crews in the community and resides in a minimum-security prison camp. His family has visited him every two weeks throughout his incarceration, even while he was in a Virginia prison during a period of extreme prison overcrowding in Michigan.

Gallina was unable to gain entry into required assaultive offender therapy until August 2005, just two months before he completed his minimum sentence. Because Gallina scores "high probability for parole" on the parole board's own guidelines, indicating he is a low risk for re-offending, the board must give "substantial and compelling reasons" for not releasing him. In September 2005, when it continued him for a year, it said:

> *Although P[risoner] has done well at work, programs & behavior & expresses remorse, he needs to complete the Assaultive Offender Therapy he is just beginning. P needs to gain greater insight into his behavior/understanding & empathy re the harm he has caused*

Gallina completed the therapy, known as AOT, in June 2006. The therapist wrote: "He displayed full and complete acceptance of responsibility for his criminal behavior with significant evidence of remorse and empathy." The therapist characterized Gallina's support plan as "formidable" and found "significant evidence of the internalization of change." He said that Gallina's relapse prevention plan demonstrates "an outline/map for success." Gallina wrote to his family:

> *I worked very hard the last 44 weeks and it shows in this report...I did everything I could do, so no matter what, I can say that.*

In October 2006, the parole board continued Gallina for a second year. It gave as its substantial and compelling reason:

> *Despite completion of recommended therapy, the Parole Board is not assured that his risk of re-offending has been diminished. Prisoner is deemed an unwarranted risk to public safety. Unwilling to parole at this time.*

Gallina, now 33, and his family were stunned. Eric Rode, who had been able to complete AOT on time, had been paroled when he first became eligible in November 2005. Ironically, the board's notes regarding Rode are equally true of Gallina: good family support, good AOT, limited prior record, excellent staff and work reports, in community for two years on bond pending appeal, good parole plans, crime out of character, spent more than half his life in prison, has matured much in last 16 years.

Gallina's next parole re-consideration date will be in October 2007, about the same time Eric Rode will discharge from parole supervision.

Faces behind the Figures

Are we safer because they're behind bars?

Ross Hayes (right) with his friend, Dale Daverman, great-nephew of the victim.

Ross S. Hayes, *No. 140420*
Crime: Second-degree murder
Sentence: Parolable Life
Parole eligible since 1984

Age 16 at the time he killed an elderly woman during a burglary, Hayes now counts the victim's nephew among his strongest supporters.

In 1974, Ross Hayes was an upcoming basketball star and a marginal ninth grade student at Ottawa Hills High School. While under the influence of LSD, marijuana, and alcohol, Hayes, age 16, and his 14-year-old cousin entered the Grand Rapids home of 89-year-old Katherine Thomas, looking for cash. When Thomas surprised them by returning home during the burglary, Hayes stabbed her once in the chest with a kitchen knife, killing her. He was arrested the next day.

Although Hayes had twice been referred to the juvenile court for breaking and entering, neither incident had resulted in a formal finding of guilt. As a result, he had never participated in any programs in the juvenile system – then one of the considerations for a juvenile waiver. The examining psychologist stated:

> *He has the mentality of an adolescent and he has the emotional disturbance of an adolescent. This young man is in need of a psychological treatment program and my recommendation would be that he receive treatment in the Pine Rest Adolescent Unit.*

Nevertheless, the probate judge waived Hayes to adult court partly because "the time [needed for] treatment may well exceed the relatively short period remaining for juvenile jurisdiction." He called his decision to have Hayes stand trial as an adult "the most difficult one in some seven years on the bench," but said he was confident that the circuit judge would handle the case "with fairness, equity, mercy and justice." On the advice of his attorney, Hayes pled guilty to second degree murder, believing that with a parolable life sentence he could be released after 10 years.

In prison, Hayes earned his GED and two associates degrees. He completed group therapy and substance abuse treatment. His work and living unit reports are excellent. In 1988, Hayes and another prisoner, Delmar Quezada, made a videotape in which they talk directly to young people about the consequences of criminal behavior. The video has been used in schools and juvenile facilities in several states. Hayes became a committed Christian in 1989. In 1998 he married Shirley Wright.

CAPPS
CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING
115 W. Allegan St., Suite 850, Lansing, MI 48933
517-482-7753 www.capps-mi.org capps@capps-mi.org

More about the men and women who fill Michigan's prisons

Since 1981, parole board members who interviewed Hayes have noted his positive attitude, his many accomplishments, and the support he has from staff, volunteers and the community. In a 1987 report to the board, his treatment team supervisor wrote:

> *[I am] very favorably impressed with the degree of [Hayes'] personal growth...and it would seem that now is the optimum time to release.*

However, the interviewing board member said: "no interest now, but maybe next time." Positive recommendations from interviews in subsequent years and numerous letters of support still resulted in routine "no interest" notices.

Meanwhile, Dale Daverman, Katherine Thomas' great-nephew, was surprised to learn through a family friend that Hayes was still in prison and began corresponding with him. Following a three-hour visit with Hayes in the spring of 2001, he wrote to the parole board chair:

> *I am absolutely convinced that Ross Hayes is sincere and has remorse for what he did . . . my father, brother and I feel Ross has paid his debt to society.*

Daverman envisions a partnership in ministry with Hayes and has advocated strongly for his release.

In 2001, after meeting with Daverman, Kent County Prosecutor William Forsyth wrote to parole board chair Stephen Marschke:

> *During my 27 years as a prosecutor, I have never [before] been asked to help facilitate the release of a convicted murderer by the family of the victim.*

Forsyth expressed surprise that the board had not taken interest in a potential release and urged the board to interview Hayes before his routinely-scheduled interview in 2004. Marschke replied that nothing in Hayes' file or the prosecutor's letter persuaded him to accelerate the review.

On July 8, 2004, parole board member Margie McNutt interviewed Hayes at length. Dale Daverman traveled from his home in Gallup, New Mexico to be there. Nonetheless, Hayes, who has now served 32 years, did not obtain the majority board vote needed to proceed to public hearing. After a 5-5 decision, he was notified that he will be reconsidered in 2009.